IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 265

JACK COAST, PETITIONER

vs.

HUNT OIL COMPANY AND OHIO OIL COMPANY

REPLY BRIEF ON BEHALF OF JACK COAST IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The respondents, Hunt Oil Company and Ohio Oil Company, have filed a brief in opposition to the petition for a writ of certiorari and have sought to minimize the importance of the federal questions raised in the petition by attempting to show that the decision of the Court of Appeals for the Fifth Circuit rests entirely upon the correct application of narrow principles of Louisiana partnership law which do not have universal importance.

Such is not the case, and a careful examination of these contentions reveals their subordinate importance to questions of federal law of wide-spread application as

well as the inapplicability of the Louisiana law which has been urged. Certain principles of Louisiana law are involved in a proper determination of this case. However, they are incidental to the major issues which concern interpretation and application of the anti-trust laws (particularly 15 U.S.C. Sec. 15), and Rules 17(b) and 19(a) of the Federal Rules of Civil Procedure. Each of these questions was presented in the original petition, but the respondents have made arguments in their reply brief and have raised various defenses which require additional consideration to reveal their inapplicability to this case.

The three major questions in this case need no repetition since a rereading of the original petition, together with the arguments, will readily reveal their substance. In their reply, the respondents have urged the following propositions, which will be taken up in order:

(1) That petitioner is not a "person" protected by the anti-trust laws because his position is analogous to a stockholder in a corporation; because he personally has not been injured in his "business or property"; and because he is not "the real party in interest."

(2) That petitioner cannot avail himself of Rule 17(b) of the Federal Rules of Civil Procedure because, under Louisiana law, the partnership, Coast Oil Company, has the capacity to sue.

(3) That the motion of petitioner to make his partner, Querbes, a party defendant under Rule 19(a), Federal Rules of Civil Procedure, should be denied be-

cause it is governed by Louisiana law and, even if granted, would have availed Coast nothing.

1.

Petitioner is a person protected by the anti-trust laws and his position is not analogous to a stockholder in a corporation. Petitioner has been personally injured in his business and property and he is the real party in interest.

In the respondents' brief (R. B. 5)[1] it is stated that petitioner's suit is analogous to a suit under the anti-trust laws by a stockholder of a corporation to recover for injury to the corporate business caused by activity in violation of the anti-trust laws. The cases relied upon by the respondents (R. B. 5) were also cited in the opinion of the Court of Appeals (R. 65)[2]. The respondents' effort to draw an analogy between the plaintiff in this litigation and stockholders' derivative suits breaks down upon careful scrutiny of the reasons advanced in the decisions in the cases which they cite, and also as soon as the distinctions between a corporation and a partnership are examined.

Justice Holmes issued a warning against the confusion of these superficially similar concepts in these words:

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1. The symbol R. B. is used herein to designate references to respondents' brief.

2. Record references are to the printed record.

"We may assume further, in accordance with a favorite speculation of these days, that philosophically a partnership and a corporation illustrate a single principle, and even that the certificate of a share in one represents property in very nearly the same sense as does a share in the other. In either case the members could divide the assets after paying the debts. But from the point of view of the law there is a very important difference. The corporation is legally distinct from its members, and its debts are not their debts. Therefore, when a paid-up share in a corporation is taken, no liability is assumed, apart from statute, but simply a right equal in value to a corresponding share in the assets and good will of the concern after its debts are paid. If the right is worth something it is a proper security, and if it is worth nothing no harm is done. It is true that a statute may add a liability, but when, as usual, this is limited to the par value of the stock, it has not been considered to affect the nature of the share so fundamentally as to prevent a national bank from taking it in pledge, with qualifications, as it might take land or bonds.

"But to take a share by transfer on the books means to become a member of the concern. The person who appears on the books of the corporation as the stockholder is the stockholder as between him and the corporation, and his rights with regard to the corporate property are incident to his position as such. *National Bank v. Case, 99 U.S. 628, 631; Pullman vs. Upton, 96 U.S. 328.* This does not matter, or matters less, in the case of a corporation, for the reasons which we have stated. But when a similar transfer is made of a share in a partnership it means that the transferee at once becomes a mem-

ber of the firm and goes into its business with an unlimited personal liability, in short, does precisely what a national bank has no authority to do." *Merchants' National Bank of Cincinnati v. Wehrmann, 202 U.S. 295, p. 300, 26 S. Ct. 613, 50 L. Ed. 1036.*

A partner's position is therefore different from that of a stockholder in a number of important particulars: First, commercial partners in Louisiana are bound in solido for the debts of the partnership, Louisiana Civil Code, Art. 2872. This is also generally true throughout the United States. *1 Fletcher, Cyclopedia of the Law of Private Corporations, p. 48* Any loss or damage to the partnership is a direct damage to each individual partner since each is fully and personally liable for *all* of the partnership obligations. In the case of a corporation, a stockholder can only lose the capital investment which he has made.

Secondly, the partner is in a different position from the stockholder for the reason that the stockholder has surrendered the operation and control of the business to a board of directors, and the affairs of the business are conducted through the board. In a partnership no such surrender of control to a board of directors, representing a distinct entity, has taken place. Under the law of Louisiana, "The partners are supposed to have given, reciprocally, to each other the power of administering one for the other. What one does is valid, even for the share of his partners, without receiving their approbation . . ." Louisiana Civil Code, Art. 2870. A managing partner

may act for the partnership "without the assent of the other partners and contrary to their prohibition . . ." Louisiana Civil Code, Art. 2867. In Louisiana the individual partners have not surrendered their right to act to some entity; whereas, in the case of an incorporated entity, the corporation represents the individual stockholders. The very fact that Louisiana procedure requires a suit on a partnership claim to be brought in the name of the partnership by each and every one of the partners is significant of the extent to which partnership remains "the sum total of the individuals" under Louisiana law. *1 McMahon, Louisiana Practice, pp. 164, 165.* The fact that a partnership is not always a legal entity has been pronounced by the Louisiana Supreme Court in *Drews v. Williams, 50 La. Ann. 579, at page 584, 23 So. 897.* There the court stated:

> "In our view, the rights and liabilities of the members of the plaintiff commercial partnership were the same as the rights and liabilities of the partnership in matters of the trespass alleged. *The injunction addressed to one of the partners had the effect of enjoining the partnership.* If it had the effect of enjoining one of the members of the commercial partnership, it necessarily enjoined both. The decisions to which our attention was invited do not establish a rule applying in every case involving partnership rights and liabilities. *We are not of opinion that always, and in every case, the firm is a legal entity, separate and distinct from its members, as contended by the defendant.* From Lindley on Partnership (Am. Ed., p. 6) we quote: 'With partnerships the case is otherwise. The members of these do not form a collective whole, distinct from

> the individuals composing it; nor are they collectively endowed with any capacity of acquiring rights or incurring obligations. The rights and liabilities of a partnership are the rights and liabilities of the partners, and are enforceable by and against them individually. "Si quid societati debetur singulis debetur et quod debet societas singuli debent." ' " (Emphasis supplied)

Finally, ownership of immovables purchased by a commercial partnership is vested in the partners as joint owners rather than in a partnership entity, and title is even registered in the individual names of all partners. In the case of corporations, real property is owned by the corporate entity (see page 19 of the petition for certiorari where this principle was discussed and cases cited). Either partner in a commercial partnership can sell his interest in the real estate. A stockholder cannot sell any interest in corporate real estate.

In the cases cited by respondents, i. e., *Gerli v. Silk Association of America, 36 F. 2d. 959; Ames v. American Telephone and Telegraph Co., 166 F. 820; Loeb v. Eastman Kodak Co., 183 F. 704; Westmoreland Asbestos Co., Inc. v. Johns Manville Corporation et al, 30 F. Supp. 390,* (R. B. 5), a number of reasons were advanced to deny a stockholder the right to sue individually for wrongs done to the corporation. These reasons may be summarized as follows:

1. The injury to a stockholder is indirect, remote, and consequential;
2. The presence of other remedies;

3. Management of the corporation is vested in a board of directors, and, in the absence of fraud or mismanagement, the discretion of the board should not be interfered with; and

4. A multiplicity of suits would result if a stockholder could bring the action.

In the present case the damage to Coast is not indirect, remote, and consequential. He is a joint owner of the property itself. He is liable to the full extent of all of his property wherever situated for all of the obligations and debts of the partnership. The respondents have stated that petitioner, Coast, is not the real party in interest, and that he, personally, has suffered no injury to his business or property (R. B. 5). It is obvious that Coast has suffered a real, direct, and personal injury if the facts of the petition are true. Anyone placed in the position of this plaintiff could not conclude otherwise.

In the case of *Loeb v. Eastman Kodak Co., supra,* the court pointed out that plaintiff had other remedies. The court stated that the plaintiff could have sued the trustee in bankruptcy for an order directing the trustee to bring suit on behalf of the bankrupt corporation, upon the stockholder putting up security for costs. In *Ames v. American Telephone and Telegraph Co., supra,* the court stated that the plaintiff there had a like remedy. In *Westmoreland Asbestos Co., Inc. v. Johns Manville Corporation et al, supra,* the corporation was also a party plaintiff, and, therefore, when the individual stockholder was dismissed, no harm resulted. In the present litigation, the

only other remedy which the lower courts have even indicated is that Coast could first sue his partner, Querbes, for a dissolution of the partnership, and then bring the action. It has not been shown, however, how Coast would be in any different or better position to bring the suit after that costly and injurious step. If Coast began a suit after dissolution, the respondents would undoubtedly claim that the cause of action had been split. Even if Coast had the funds to buy Querbes' partnership interest, it would likely be advanced that he had purchased a litigious right.

Management of the partnership affairs has not been surrendered to a board of directors. Coast is actually the managing partner under the articles of partnership, and, under the Louisiana law hereinabove mentioned, a managing partner may act for the partnership without the assent of the other partners and contrary to their prohibition. The doctrine of multiplicity of suits has not even been argued by the respondents, although it is mentioned in the cases cited by them. When persons injure others through their wrongful acts, they are responsible in damages to each and every person whom they injure and cannot force all of the injured parties to sue in one action. If Coast has himself, personally, been injured, he has a right to sue irrespective of injury to others.

The cases *Atlanta v. Chattanooga Foundry & Pipeworks et al, 127 F. 23, affirmed 203 U.S. 390, 27 S. Ct. 65, 51 L. Ed. 241*, and *Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 68 S. Ct. 996, 92 L. Ed. 1328*, decided by this court, illustrate the broad cover-

age contemplated by the anti-trust laws. These cases show that the word "person" is not to be given a restrictive meaning but is to be given a construction which will effectuate the purpose of the anti-trust laws, that is, the protection of all who are injured by unfair practices or combinations violating the substantive provisions of the law.

2.

If the partnership, Coast Oil Company, as such, has no capacity to sue under Louisiana law, the suit may be brought in the name of the partnership under Rule 17(b), Federal Rules of Civil Procedure, since a federal substantive right is involved.

Rule 17(b), Federal Rules of Civil Procedure, allows a partnership to sue in its common name where a federal substantive right is involved and the partnership has no capacity as such to sue in its common name under state law. There is no question relative to the existence here of a federal substantive right, but respondents contend that the partnership entity has the capacity to sue in Louisiana because certain Louisiana cases must be followed which hold that all partners must join in a suit, in their individual capacities and in the name of the firm, to recover on partnership debts. According to the argument made by the respondents, the only possible way in which a Louisiana partnership can bring suit is for each and every partner to be before the court as a party plaintiff. Under this very contention, how can it be said that capacity

exists in the partnership, as such, and yet every partner must join?

In *United Mine Workers of America et al v. Coronado Coal Company et al, 259 U.S. 344, 42 S. Ct. 570, 66 L. Ed. 975*, the contention was made that the United Mine Workers had capacity to be sued only by joining and suing each of its members and that, because such capacity existed, a suit against the entity could not be effected. This court specifically overruled that contention and allowed suit without joining every member. In the many cases since the *United Mine Workers* case, which cases are cited at pages 24 and 25 of the petition for certiorari, even though the partnership or association could have sued or been sued by joining each and every member, this was not required in any case where a federal right was involved. The construction of Rule 17(b) which has been advanced by the respondents would make that rule utterly useless. It has always been held, even under the common law, that partnerships and associations could sue and be sued if all members were joined. In that sense they have always had capacity. Rule 17(b) has for its specific purpose the elimination of the joining of all parties. For litigation purposes, the partnership may sue and be sued "as an entity for the purpose of enforcing a federal substantive right." *3 Moore's Federal Practice, 2d. Edition, Sec. 17.25, page 1409.*

Busby v. Electric Utilities Employees Unit, 323 U.S. 72, 65 S. Ct. 142, 89 L. Ed. 78, cited by respondents (R. B. 9), merely states the rule of 17(b). The case of *United Copper Securities Company v. Amalgamated Cop-*

per Company, 244 U.S. 261, 37 S. Ct. 509, 61 L. Ed. 1119, cited by respondents (R. B. 9) to show the inapplicability of Rule 17(b), is itself completely foreign to any discussion relative to that rule because that case deals with a stockholder attempting to bring a suit in the corporate name. Rule 17(b) does not even purport to deal with corporations.

The powers of Jack Coast, the petitioner, as the managing partner, have been mentioned heretofore in this brief and also in the original petition. According to the citations of authorities from Louisiana law contained both in the respondents' brief and in the decisons of both lower courts, a Louisiana partnership in effect has no capacity, as such, to bring any suit so long as the requirement is made that all partners be joined prior to the bringing of the suit. The requirement of joinder of all partners deprives the partnership of capacity and thereby brings the case directly within the terms of Rule 17(b), which authorizes a suit on behalf of a partnership, as such, when capacity is denied the partnership, as such, by state law.

3.

The motion of petitioner to make Justin R. Querbes a party to the suit under Rule 19(a), Federal Rules of Civil Procedure, should be allowed. The motion is not governed by Louisiana law, and, if granted, all parties would be before the court.

In the petition for certiorari, a number of cases were cited from other jurisdictions which have allowed a partner to sue on a partnership claim and join the partners

as hostile plaintiffs who have refused to bring the suit. The respondents state that the cases cited by petitioner at pages 29 and 30 of the petition for certiorari are distinguishable and inapplicable to this litigation because under the civil law of Louisiana a partnership is a distinct legal entity, whereas the cases cited by petitioner arose in common law jurisdiction where the partners have "an interest in the cause of action" (R. B. 12).

This attempted distinction is a play on words only. In none of the cases cited by petitioner was it held that one partner could sue separately. It was specifically stated that all of the partners were necessary parties to the suit, and a hostile partner was made a party to the suit involuntarily so that a judgment would be binding on all parties. The case of *Ingram Lumber Company v. Ingersoll et al, 93 Ark. 447, 125 S.W. 139*, is typical of the remainder of the cases. The court stated:

> "The claim herein sued on grew out of a contract made with the partnership and therefore was a partnership asset. All parties . . . were . . . necessary parties to the action . . . . where one partner is unwilling to join in a suit to enforce a partnership claim, the other co-partners have a right to use his name upon indemnifying him against loss, if indemnity is demanded . . . ., and in its sound discretion the court has the right to prevent dismissal of a suit by one partner where it appears that the dismissal will result in an injury to the other partners." *125 S.W. 139, at page 141.*

In that case, the court specifically held that the suit could not be prosecuted without all partners being before the

court, but the holding of the court did not leave the partner remediless who brought the suit.

Again, in *Henson v. First Security and Loan Company, 2 Pac. 2d. 85, at page 86*, the court stated:

> ". . . Henson is a party plaintiff, that is, a member of the partnership, and made such a party by his partner under the general rule of law that it is within the implied power of a partner to institute ordinary legal proceedings in behalf of a firm by using the names of all the parties as such as plaintiffs for the enforcement of the rights of the firm."

The cases cited by the respondents, *Read et al v. Industrial Accident Commission, 73 Pac. 2d. 1212; Lewis et al v. Joseph Hartley & Sons, 83 N.E. 2d. 438; Roosmore v. Commissioner of Internal Revenue, 76 F. 2d. 520; Allison v. Campbell, 1 S.W. 2d. 866;* and *Hewitt v. Brown, 29 S.E. 2d. 326*, are in no way in conflict with the cases cited by petitioner since none of those cases involve the precise question as to whether or not a hostile partner can be joined against his will to assert a partnership claim.

As was stated in the petition for certiorari (p. 22), there is no difference between the Louisiana entity theory of partnerships and the common law theory since in both jurisdictions each and every partner must be a party to the suit to assert a partnership claim. The result is the same in both jurisdictions and the cases cannot be distinguished on the basis of an entity theory.

Respondents state "that under Louisiana law the partners in a Louisiana partnership have no interest,

joint, united, or otherwise, in the partnership property or claims" (R. B. 15). This statement is simply incorrect. In the petition for certiorari (p. 19), Louisiana authorities have already been cited which hold that the individual partners are joint owners of partnership real estate and each can sell his portion. Moreover, under the very cases cited by the respondents, it has been held that when the partners all join individually and as partners, they may recover in a suit for partnership claims; their interest is united and joint. The partnership has no being separate from the actions of its partners.

The respondents have also asserted that even if Querbes is joined in this action, it would not remedy the failure of the complainant to state a cause of action because the entity, Coast Oil Company, would still not be a party to the suit. The petitioner included six alternative demands in his amended complaint (R. 35, 36, and 37). Under paragraphs 27, 29, and 31 of the amended complaint, Coast Oil Company is a party to the action. The entity, Coast Oil Company, as respondents refer to it, has no ability to join itself in the action since it is an intellectual concept which can only act through one or both of its partners. There is no one else who can be joined, yet respondents say this is still insufficient, and that since Querbes has originally withheld his consent to join in the suit, his appearance as a hostile plaintiff would not cure the defect. Respondents state: "The firm still would not be represented by and acting through all of the partners in their capacities as partners and as collectively

bringing the partnership into Court . . . ." (R. B. 17). If Querbes and Coast Oil Company are made parties as set forth in the alternative demand, then the want of consent is automatically supplied and any action thereafter will be binding on Coast, Querbes, and the partnership.

CONCLUSION

This suit involves a demand by petitioner for damages to himself in excess of $1,364,000.00, or, alternatively, to the partnership in excess of $4,000,000.00 (R. 8). At the outset, petitioner has been denied his day in court by the maintenance of technical objections of the respondents dealing with his right to bring any suit arising out of the cause of action because petitioner's partner, Justin R. Querbes, has been unwilling to join in the suit for reasons of his own. The respondents have taken the position, sustained by the courts below, that if Querbes will not voluntarily become a plaintiff, then petitioner's only remedy is to dissolve the partnership before bringing this suit. This would, of course, damage the petitioner even further than he has already been injured and the consequent delay could possibly bar the petitioner from proving some of his most substantial injuries on the basis of prescription or limitation. It is also likely that even though the partnership were wound up, Coast would still be confronted with an objection to his bringing suit. If Coast does not have

sufficient funds to buy out Querbes, then these defendants will still state that the claim is one belonging to the partnership and must be asserted through it.

The precedent established in this case by the court below, if allowed to stand, will not only sanction serious loss to the petitioner but an incorrect solution of three important federal questions will lay as a stumbling block to litigants in diverse situations. Anti-trust litigation and the protection of the rights of small business is becoming increasingly important.[3] The Federal Rules of Civil Procedure are applied daily throughout the federal system, and their correct and uniform interpretation is of far-reaching importance. Rules 17(b) and 19(a) are frequently injected in cases arising under the Fair Labor Standards Act, the National Labor Relations Act, the Labor Management Citations Act, the War Labor Disputes Act, the Patent Laws, the Price Control Statutes, and actions involving constitutional rights as well as anti-trust litigation. In all of these situations, the position of a partner in a suit of this type is uncertain and a definite decision by this court is urgently needed. Although this reply brief has been concerned with refuting certain arguments of the respondents, based, it is said, on Louisiana law, the determination of the issues in this case is essentially a matter of universal federal jurisprudence.

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3. Antitrust Enforcement by Private Parties: Analysis of Developments in the Treble Damage Suit, 61 Yale L. J. 1010.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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